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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 0 2 2010

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision will be withdrawn, and the matter will be remanded to the director for further consideration and a new decision.

The petitioner claims to be a provider of IT services and products. It seeks to permanently employ the beneficiary in the United States as a senior software engineer. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1] As required by 8 C.F.R. § 204.5(k)(4), the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the Department of Labor (DOL).

As set forth in the director's February 20, 2008 denial, the primary issue in this case is whether the job offered requires a member of the professions. The AAO will also consider whether the petitioner has established its ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence.[2]

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO maintains plenary power to review each appeal on a *de novo* basis. *See Janka v. U.S. Dept. of Transp.*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

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[1]There is no evidence in the record of proceeding that the beneficiary possesses exceptional ability in the sciences, arts or business. Accordingly, consideration of the petition will be limited to whether the beneficiary is eligible for classification as a member of the professions holding an advanced degree.

[2]An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States,* 229 *F.* Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003).

[3]The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On the petition, the petitioner claimed to have been established in 2004, to have a gross annual income of $9.5 million, and to employ 88 workers. The proffered wage stated on the labor certification is $80,000.00 per year. The priority date of the petition is June 13, 2006, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States.[4] In order to classify the beneficiary in this employment-based preference category, the petitioner must establish that the labor certification requires an advanced degree professional.[5]

It is important to note that the DOL's role in the employment-based immigrant visa process is limited to determining whether there are sufficient U.S. workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a). It is significant that none of the responsibilities assigned to the DOL, nor the remaining regulations implementing these duties at 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or the job offered. Instead, the authority to make this determination rests solely with U.S. Citizenship and Immigration Services (USCIS). *See Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983).

The minimum education, training, experience and skills required to perform the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the position has the following minimum requirements:

H.4. Education: Bachelor's degree in "Any discipline"
H.5. Training: None required
H.6. Experience: 60 months of experience in the job offered required
H.7. Alternate field of study: None accepted
H.8. Alternate combination of education and experience: Masters degree accepted in lieu of a bachelor's degree and 60 months experience
H.9. Foreign educational equivalent: Accepted

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[4]The regulation at 8 C.F.R. § 204.5(k)(2) defines an "advanced degree" as "any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate." The regulation further states that a "United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." *Id.*

[5]8 C.F.R. § 204.5(k)(4).

H.10. Experience in an alternate occupation: 60 months experience as a Senior Programmer Analyst
H.14. Specific skills or other requirements: None

The labor certification states that the highest level of education that the beneficiary achieved was a bachelor's degree in mechanical engineering from Osmania University, India.

The job offer portion of the labor certification "must demonstrate that the job requires a professional holding an advanced degree or the equivalent." 8 C.F.R. § 204.5(k)(4). If the job itself does not require an advanced degree professional, the petition must be denied.[6]

The regulation at 8 C.F.R. § 204.5(k)(2), defines "professional" as:

> [O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

Section 101(a)(32) of the Act states that the term "profession" "shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." 8 U.S.C. § 1101(a)(32).

The offered position is not one of the occupations listed at Section 101(a)(32) of the Act. Therefore, the analysis of whether the offered position requires a member of the professions is based on whether a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The director acknowledged these definitions, but then relied on *Matter of Shin,* 11 I&N Dec. 686 (Dist. Dir. 1966) and *Matter of Palanky,* 12 I&N Dec. 66 (Reg'l. Comm'r. 1966), for the proposition that the degree must be related to the field. We note that in *Matter of Shin,* 11 I&N Dec. at 688, the District Director did state that a degree in and of itself was insufficient; rather, the "knowledge acquired must also be of [a] nature that is a realistic prerequisite to entry into the particular field of endeavor." The following discussion, however, was limited to the level of education required, not the major field of study. Moreover, *Matter of Palanky,* 12 I&N Dec. at 68, addressed an occupation that did not require a full baccalaureate. Further, these cases predate the regulation at 8 C.F.R. § 204.5(k)(2). Therefore, the definition of "profession" in that regulation, which states only that a profession must require a baccalaureate for entry into the occupation, takes precedence over the two cases cited in the director's decision.

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[6]The labor certification requires an individual with a bachelor's degree and five years of experience, or, in the alternative, a master's degree. This is sufficient to establish that the job requires an advanced degree. *See* 8 C.F.R. § 204.5(k)(2).

Although the definition of "profession" at 8 C.F.R. § 204.5(k)(2) does not state that the labor certification must require a field of study that relates to the occupation, the regulation does provide that a profession is an occupation for which a United States baccalaureate degree or its foreign equivalent is the *minimum* requirement for *entry* into the occupation. Thus, some professions may require *more* than a baccalaureate in an unspecified field for entry into that particular profession. In such cases, USCIS is justified in considering whether the labor certification that does not specify one or more fields of study can truly be considered to require a member of the professions. We note that being a member of the professions does not entitle the alien to classification as a professional if he does not seek to continue working in that profession. *See Matter of Shah,* 17 I&N Dec. 244, 246-47 (Reg'l. Comm'r. 1977).

On the labor certification, the DOL categorized the offered position under SOC code 15-1031, Computer Software Engineers, Applications. The O*NET online database[7] states that the occupation of Computer Software Engineers, Applications falls within Job Zone Four,[8] and that 85% of Computer Software Engineers, Applications hold a baccalaureate degree or higher.[9]

The corresponding entry in the Occupational Outlook Handbook (OOH) for SOC code 15-1031 is Computer Software Engineers.[10] The required education for this occupation is summarized as follows:[11]

> Most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The *usual* college major for applications software engineers is computer science or software engineering.

(Emphasis added). In summary, O*NET and the OOH confirm that the offered position requires at least a bachelor's degree. In addition, the OOH states that the usual bachelor's degree for this occupation is computer science or software engineering, but is not required for entry into the

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[7]O*NET, located at www.online.onetcenter.org, is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations."

[8]According to O*NET, most of occupations in Job Zone Four require a four-year bachelor's degree. http://online.onetcenter.org/help/online/zones (accessed January 8, 2010).

[9]Details Report for 15-1031.00 at http://online.onetcenter.org/link/details/15-1031.00 (accessed January 8, 2010).

[10]The OOH, located at http://www.bls.gov/OCO, is a nationally recognized source of career information published by the DOL's Bureau of Labor Statistics.

[11]http://www.bls.gov/oco/ocos267.htm (accessed January 8, 2010).

profession. Therefore, it is concluded that the offered position does not require an individual to possess a degree in one or more specific fields of study.[12]

Further, it is noted that the beneficiary possesses a degree in a relevant field as well as significant professional experience in the occupation. The beneficiary was awarded a bachelor of engineering from Osmania University. The beneficiary's has worked as a computer professional since 1997. The beneficiary has earned a postgraduate diploma in computer applications from [redacted] and a diploma in client server technology from [redacted] The beneficiary's education and experience are consistent with the requirements of the occupation as stated in the OOH.

In light of the above, the petitioner has established that the position certified by the DOL is a profession. Thus, the director's decision on this issue is withdrawn.

Beyond the decision of the director, however, the evidence in the record does not establish that the petitioner has the ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence.

In order to obtain classification the requested employment-based preference category, the petitioner must establish that its job offer to the beneficiary is a realistic one. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). The regulation 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Therefore, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the June 13, 2006 priority date, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The proffered wage stated on the labor certification is $80,000.00 per year.

In this matter, the petitioner did not provide an annual report, federal tax returns, or audited financial statement for 2006 as required by 8 C.F.R. § 204.5(g)(2).

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[12]It is noted that the director did not reference a source of information suggesting that a minimum of a baccalaureate in any field of study was not a normal requirement for the occupation.

Further, it is noted that the petitioner has filed immigrant petitions on behalf of multiple beneficiaries. Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must establish that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wage to each beneficiary as of the priority date of each petition and continuing until each beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. at 144. The record in the instant case contains no information about the priority dates and proffered wages for the beneficiaries of the other petitions, whether the beneficiaries have withdrawn from the petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. There is also no information in the record about whether the petitioner has employed the beneficiaries or the wages paid to the beneficiaries, if any.

Thus, assessing the totality of the circumstances in this case, it is concluded that the evidence in the record does not establish the petitioner's ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issues stated above. The director may request any additional evidence considered pertinent. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new decision.